2005

State of Utah v. Michael Von Ferguson : Reply Brief

Utah Supreme Court

IN THE UTAH SUPREME COURT

STATE OF UTAH,	:	
Appellant/Petitioner	:	
v.	:	
MICHAEL VON FERGUSON	:	Case No. 20050376-SC
Appellee/Respondent	:	*Respondent is incarcerated.*

REPLY BRIEF OF CROSS-PETITIONER

ON CERTIORARI TO
THE UTAH COURT OF APPEALS

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REPLY BRIEF OF CROSS-PETITIONER

INTRODUCTION

This reply brief on cross-petition is limited to the issue raised on cross-petition in Point II of the brief of Respondent/Cross-Petitioner Michael Von Ferguson ("Respondent's brief"). See page 25-49 of Respondent's brief. In Point II, Respondent argued that since the judgment shows on its face that he was not represented by counsel, the state had the burden of establishing a constitutionally adequate waiver of counsel in order to use the prior conviction to enhance the current charge to a felony. See Respondent's brief at 25-49. This cross-reply further demonstrates that the trial court correctly placed the burden on the state, and the court of appeals erred in presuming that Ferguson waived counsel and overturning the decision of the trial court. See trial court ruling in Addendum A.

SUMMARY OF THE ARGUMENT

Claims that a defendant was denied his right to counsel have a "special status" in post-conviction proceedings. This Court has recently recognized that this "special status" precludes a court from presuming that a defendant waived counsel unless there is evidence that the defendant affirmatively acquiesced in proceeding without counsel. This is consistent with United States Supreme Court case law which precludes presuming waiver of counsel from a silent record. Regardless of how this Court characterizes the role of the presumption of regularity when the judgment shows that the defendant did not have counsel - that it attaches but does not include a presumption that the defendant waived counsel, that it attaches but is rebutted by the judgment showing that defendant did not have counsel, or that it does not attach at all – this Court's case law and that of the United States Supreme Court establish that a court cannot presume that the defendant waived counsel.

The state's claim that the analysis for waiver of counsel claims set forth in Heaton and Faretta does not apply in collateral proceedings is without merit. The state does not cite to any cases that support this claim. Instead, the state relies on a single case where the Court refused to apply the presumption employed on direct appeal for Boykin claims in a collateral proceeding. But Boykin claims do not have the "special status" that deprivation of counsel claims have, and the United States Supreme Court has made it clear that right to counsel claims can be addressed in collateral proceedings. Additionally, Heaton and a variety of other cases rely on collateral decisions which apply

the same analysis to lack of waiver of counsel claims as that which is applied on direct appeal.

Finally, the state's claim that if it loses on certiorari, it nevertheless should be given another chance to sustain its burden of proof should be rejected. Aside from the state's failure to adequately brief this claim, the claim disregards the fact that the enhancement has been dismissed in the trial court. The state has not cited any statutes, rules or case law that would allow it to resurrect a dismissed enhancement, and it fails to cite or consider case law that precludes refiling unless there is newly discovered evidence or good cause. If this Court ultimately affirms the trial court ruling, there will be nothing in the trial court to review. Additionally, if the state thought it could just try again in the trial court to sustain its burden, it should have done so rather than taking this appeal and subsequent certiorari review while Ferguson was being held pretrial in the county jail. Allowing the state a "second bite of the apple" under these circumstances would encourage poor preparation by prosecutors, be costly and time consuming to defendants and courts, and lead to further delay in this case.

ARGUMENT

Reply on Cross-Petition

POINT. BECAUSE THE JUDGMENT SHOWED THAT FERGUSON WAS NOT REPRESENTED BY COUNSEL, THE STATE WAS REQUIRED TO ESTABLISH A CONSTITUTIONALLY ADEQUATE WAIVER OF COUNSEL

This Court's recent decision in Lucero v. Kennard, 2005 UT 79, 539 Utah Adv. Rep. 21 (see Addendum B) and other cases establish that the trial court correctly refused to presume that Ferguson waived counsel. Regardless of whether the presumption did

not attach, attached but did not include a presumption that Ferguson's right to counsel was preserved, or attached and was rebutted because Ferguson was not represented by counsel, the burden was on the state to establish a constitutionally adequate waiver of counsel since the judgment showed that Ferguson was not represented. In addition, the state's claim in its reply brief that the analysis for assessing waiver of counsel claims outlined in State v. Heaton, 958 P.2d 911 (Utah 1998) and Faretta v. California, 422 U.S. 806 (1975) does not apply to post-conviction proceedings is without merit and should be rejected. Moreover, the state's request that it should be given another chance to establish that Ferguson waived counsel so as to reinstate the dismissed enhancement should be denied since the state has had the opportunity to sustain its burden and the matter has been dismissed below.

A. Waiver of Counsel Cannot Be Presumed

As the state acknowledges, this Court recently reiterated that a defendant's claim that he was denied his right to counsel has a "special status" in post-conviction proceedings. State's reply brief at 19-21, citing Lucero, 2005 UT 79, ¶25 (see Addendum B). Because of this "special status," even when the judgment enjoys a presumption of regularity, waiver of counsel cannot be presumed. Id. This Court's recent discussion is consistent with United States Supreme Court case law, this Court's cases, and cases from other jurisdictions, all of which demonstrate that the government is required to establish waiver of counsel when a judgment shows that the defendant was not represented. Regardless of whether a presumption of regularity attaches and is rebutted or does not attach at all, Lucero and other cases require that courts can not presume waiver under

these circumstances. Id. In this case, where the only evidence placed before the trial court at the motion to quash hearing showed that Ferguson was not represented by counsel, the court of appeals erred in presuming that Ferguson made a constitutionally adequate waiver of counsel. See State v. Ferguson, 2005 UT App 144, ¶31, 111 P.3d 820.

This Court recognized in Lucero that because of the "special status" of deprivation of counsel claims, a court cannot presume waiver even when a presumption of regularity attaches to a judgment. Lucero, 2005 UT 79, ¶¶24, 25. Although this Court acknowledged that "where a defendant seeks to collaterally attack a court's judgment, we presume the regularity of the proceedings below," it also recognized that such a presumption does not include a presumption that the defendant waived counsel. Id. This Court stated:

> That presumption [of regularity] notwithstanding, the analysis of whether a defendant is entitled to post-conviction relief is more complicated in cases where a defendant raises a deprivation of counsel claim because of the "special status" conferred upon the constitutional right to counsel. Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 404, 121 S.Ct. 1567, 149 L.Ed.2d 608 (2001) (concluding that failure to appoint counsel claim "warrants special treatment among alleged constitutional violations"); *see* Custis v. United States, 511 U.S. 485, 494-96, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994) (discussing the "historical basis" for treating collateral attacks based on a denial of the right to counsel differently than other constitutional rights). A court may not presume waiver of the right to counsel unless there is some evidence that the defendant affirmatively acquiesced to the waiver of counsel. *See* Carnley v. Cochran, 369 U.S. 506, 516-17, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962) ("[N]o . . . burden [to overcome presumption of regularity] can be imposed upon an accused unless the record - - or a hearing, where required - - reveals his affirmative acquiescence."); State v. Hamilton, 1987 Utah LEXIS 638 at ¶5 (Waiver [of the right to counsel] may not be presumed from a silent record.") *see also* Arbuckle v. Turner, 440 F.2d 586, 589 (10th Cir. 1971); Clark v. Turner, 283 F. Supp. 909, 913 (D. Utah 1968) (same). If such evidence is presented, the defendant has the burden of proving that

> the right to counsel was not knowingly, intelligently, and voluntarily waived. *See* Iowa v. Tovar, 541 U.S. 77, 92, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004) ("[I]n a collateral attack on an uncounseled conviction, it is the defendant's burden to prove that he did not competently and intelligently waive his right to the assistance of counsel."); Carnley, 369 U.S. at 515, 82 S.Ct. 884 ("Presuming waiver [of the right to counsel] from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer."); *see also* Dyett v. Turner, 287 F.Supp. 113, 115-16 (D.Utah 1968) (imposing burden on defendant to show invalidity of waiver of counsel when the record did not indicate that the waiver was involuntary); McGhee v. Sigler, 328 F.Supp. 538, 542 (D.Neb.1971) ("[I]f there was acquiescence by the defendant in the trial court's not appointing counsel, the burden then becomes the defendant's....").

Lucero, 2005 UT 79, ¶25. Contrary to the state's suggestion that this discussion should be overturned or disregarded because it is not well reasoned and is dictum (state's reply brief at 19-22), this Court should follow Lucero since the analysis challenged by the state is based on well established case law and was integral to the Lucero decision. See id.

As this Court pointed out in Lucero, Lackawanna and Custis recognize the "special status" afforded right to counsel claims. Id. (citing Lackawanna, 532 U.S. at 404; Custis, 11 U.S. at 496). Both of these cases indicate that the "'failure to appoint counsel for an indigent [is] a unique constitutional defect . . . ris[ing] to the level of a jurisdictional defect,' which therefore warrants special treatment among alleged constitutional violations." Lackawanna, 532 U.S. at 404 (quoting Custis, 511 U.S. at 496). In fact, the Court emphasized in Lackawanna that the special status of Gideon[1] claims is well established, and because of that special status, created an exception allowing defendants to challenge a prior conviction used to increase a federal sentence even though the prior conviction was "conclusively valid" because the defendant had no

[1] Gideon v. Wainwright, 372 U.S. 335 (1963)

further collateral attack available. Lackawanna, 532 U.S. at 403-04.

Additionally, as the state recognizes, Carnley, 369 U.S. at 516-17, precludes a court from "presum[ing] that a defendant waived counsel where the trial record is silent on the matter." State's reply brief at 22. This Court recognized that rule in Lucero, stating that "[a] court may not presume waiver of the right to counsel unless there is some evidence that the defendant affirmatively acquiesced to the waiver of counsel." Lucero, 2005 UT 79, ¶25 (citing Carnley, 369 U.S. at 516-17). In addition, this Court quoted Carnley for the proposition that a defendant does not have the burden to establish lack of waiver "'unless the record - - or a hearing, where required - - reveals his affirmative acquiescence [in proceeding without counsel].'" Lucero, 2005 UT 79, ¶25 (quoting Carnley, 369 U.S. at 516-17).

The state attempts to undermine the rule of Carnley by unduly narrowing its holding to circumstances where the trial court has reviewed the entire record of the prior proceeding, including a transcript, and finds nothing to support a waiver of counsel. See state's reply brief at 21-22. But Carnley explicitly precludes a court from presuming waiver of counsel, regardless of what the parties put before it for review, unless the evidence before the court indicates that the defendant acquiesced in proceeding without counsel. See Carnley, 369 U.S. at 516-17. Moreover, the Carnley Court's statement that either a record "or hearing where required" can establish whether a defendant waived counsel (Id.) demonstrates that the Court did not limit its refusal to presume waiver to only those circumstances where a court had a transcript before it and instead adopted a rule that precluded presuming waiver when there was nothing before the court to suggest

that the defendant had waived counsel. Id. (emphasis added). Accordingly, Carnley demonstrates that unless the state introduces evidence that a defendant who appeared pro se waived counsel, the defendant cannot be required to overcome a presumption that his right to counsel was preserved.

In addition to being solidly based on case law, Lucero's discussion of the burden of proof was integral to the decision in that case. Lucero claimed that his right to counsel had been violated in a justice court proceeding and filed a petition for post-conviction review in district court. On certiorari, the justice court argued that the court of appeals' decision that Lucero was not entitled to post-conviction relief because he had not appealed should be upheld in part because "justice court defendants are not eligible to receive post-conviction relief under the PCRA [Post-Conviction Remedies Act]." Lucero, 2005 UT 79, ¶9. According to the justice court, the lack of a record in justice courts precluded post-conviction review of Lucero's claim that he was deprived of counsel and supported the court of appeals' decision that a trial de novo appeal was Lucero's only remedy. Id. Because of the important role played by presumptions and burdens of proof, particularly when there is no record available, this Court necessarily was required to discuss the manner in which Lucero's Gideon claim could be reviewed since there was no record. Hence, this Court's discussion in Lucero indicating that a court cannot presume waiver of counsel unless the record affirmatively demonstrates that a defendant acquiesced in proceeding without counsel was necessary to the decision in Lucero. See id.

Regardless of how this Court characterizes the role of the presumption of

regularity when the judgment shows the defendant was not represented by counsel, Lucero and the cases cited therein demonstrate that the presumption does not require a defendant to establish that he did not waive counsel unless the record affirmatively shows that he agreed to proceed without counsel. See Lucero, 2005 UT 79, ¶25; Dyett v. Turner, 287 F. Supp. 113, 115-16 (D. Utah 1968) (cited favorably in Lucero, 2005 UT 79, ¶25). In other words, regardless of whether the presumption does not attach, attaches but does not include a presumption that the defendant waived counsel, or attaches but is rebutted because the judgment shows that Ferguson did not have counsel, Lucero and the cases cited therein support Ferguson's position that he cannot be required to establish that he did not waive counsel. Lucero, 2005 UT 79, ¶25. In fact, Lucero, the cases cited therein, Triptow, and other cases demonstrate that if the record shows that a defendant waived counsel, the burden shifts to the defendant to establish that the waiver was not knowing and voluntary, but if the record simply shows that the defendant was not represented without showing that he waived counsel, the burden remains with the state to establish waiver. See Lucero, 2005 UT 79, ¶25; see also Dyett, 287 F.Supp. at 115-16.

Contrary to the state's assertions, Triptow does not override Lucero. See state's reply brief at 24-5. Triptow involved circumstances where the judgment was silent as to whether Triptow was represented by counsel, and this Court presumed that the trial court had proceeded with regularity, which included a presumption that Triptow was represented by counsel. State v. Triptow, 770 P.2d 146, 149 (Utah 1989). In order to rebut this presumption, Triptow was required to "raise the issue and produce some evidence that he [ ] was not represented by counsel and did not knowingly waive

counsel." Id. By contrast, this case and Lucero involve circumstances where the defendant was not represented by counsel; because the record in Triptow did not show that defendant was unrepresented, Triptow did not directly address the circumstances of this case. Instead, well established case law which precludes presuming waiver of counsel from a silent record controls and places the burden to establish waiver on the state. See Lucero, 2005 UT 79, ¶25.

Additionally, Triptow involved a felony conviction where this Court attached a presumption of regularity, including a presumption that Triptow was represented by counsel, to a judgment that did not show that Triptow was unrepresented. By contrast, the conviction at issue in this case was a misdemeanor conviction taken during a busy misdemeanor calendar where the details attendant to felony convictions are not always observed. See generally Dressler v. State, 819 P.2d 1288, 1295 (Nev. 1991) (recognizing that because of "the informal nature of the prosecution of misdemeanor cases, [ ] the stringent standard of review used in felony cases" does not apply). As set forth in Respondent's opening brief at 35-36 and 44, some courts have recognized that misdemeanors are not always given the same exacting protections that occur in felony prosecutions and have therefore refused to apply a presumption of constitutional validity or a presumption that the right to counsel was protected to a misdemeanor conviction obtained under these circumstances. See e.g. Dressler, 819 P.2d at 1295. This Court likewise should acknowledge the reality of busy misdemeanor calendars is that constitutional protections are not always as carefully observed as they are in felony prosecutions and refuse to presume that the right to counsel was observed in this case,

especially in the face of a record showing that both the trial court and trial judge in this case were unaware that Ferguson had a right to counsel in a suspended jail case. See Respondent's brief at 35.

Despite the distinctions between this case and Triptow and this Court's more recent analysis in Lucero, the state argues that Triptow controls and requires that a defendant such as Ferguson must produce some evidence not only that he was unrepresented but also that he did not waive counsel. State's reply brief at 32. In addition to the fact that Triptow involved a felony prosecution and did not directly address this issue since the judgment did not show that Triptow was unrepresented, the rationale in Triptow and its selection of a middle ground position for assessing burdens of proof further demonstrates that a defendant is not required to establish evidence of waiver of counsel under these circumstances.

In fact, this Court rejected a position taken by some courts that requires defendants to prove lack of representation and lack of a constitutionally adequate waiver and instead embraced what it perceived to be as a fairer, middle ground position. Triptow, 770 P.2d at 148-49. That position takes into account the presumption of regularity, but also allows that presumption to be rebutted by a relatively minor showing by the defendant that his right to counsel may have been violated. Under the current state of the law, given the court of appeals' opinion in State v. Gutierrez, 2003 UT App 95, 68 P.3d 1035, which precludes a defendant from presenting "some evidence" that he did not waive counsel through affidavits, pursuant to the state's argument, any defendant claiming that his right to counsel was violated would be required to produce transcripts and court records,

regardless of whether the judgment showed that the defendant appeared without counsel.[2] Id. at ¶7. This would essentially place the burden on the defendant to establish "that there was an actual lack of representation without a knowing waiver of counsel in the earlier proceeding" in all cases. Triptow, 770 P.2d at 148. Since Triptow rejected this position, the state's argument that the defendant is required to establish lack of waiver even though the judgment shows he was not represented, fails under Triptow.

Moreover, the effect of the state's argument in this case, if successful, would be that if a defendant did not produce court records or transcripts either because he could not afford them or was not represented and did not know how to obtain them, the prior conviction would be automatically admissible even though it showed that the defendant was not represented. In other words, the state's analysis creates a presumption that the defendant waived counsel which is contrary to Lucero and the controlling case law.

As Triptow acknowledges, some courts have taken a more stringent position and required a defendant to establish that he did not waive counsel. See Triptow, 770 P.2d at 148-49. To the extent the state cites cases that apply this more stringent position, those cases have no application in the face of Triptow's decision to apply a middle position and

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[2] Although the state claims that "placing the burden on defendant [to establish that he did not waive counsel] makes sense because he is likely to know whether he was represented and, if not, whether he waived counsel" (state's reply brief at 17), a defendant's assertion that he did not have counsel and did not waive counsel is not sufficient to rebut the presumption of regularity under Gutierrez, 2003 UT App 95, which is controlling in Utah's trial courts. Since the state is seeking to use the conviction to prove an element of a crime and has more resources and the ability to obtain a complete record, it actually makes more sense to require the state to establish waiver. Additionally, since waiver of counsel is a legal concept, the state's assertion that a defendant is in the best position to know whether he waived counsel is incorrect.

this Court's recent discussion in Lucero. Additionally, cases that presumed waiver when the record shows the defendant was not represented are inconsistent with United States Supreme Court case law. See e.g. Carnley, 369 U.S. at 516-17.

Moreover, many of the cases cited by the state for the proposition that Ferguson had the burden of proving waiver involve different circumstances than the present case. For example, it is not clear whether the judgment in United States v. Quintana-Ponce, 129 Fed. Appx. 473, 475 (10th Cir. 2005) showed that the defendant appeared without counsel, and in United States v. Cruz-Alcala, 338 F.3d 1475 (10th Cir. 2003), the record was not silent regarding waiver and instead showed that defendant waived counsel. Id. at 1198. Other cases cited by the state such as State v. Probst, 339 Or. 612, 124 P.3d 1237 (Or. 2005) involved circumstances where the record showed that the defendant acquiesced in proceeding without counsel after being informed of the right and the risks of proceeding without counsel. As this Court recognized in Lucero, circumstances where the record shows that the defendant acquiesced in proceeding without counsel are different from the circumstances of this case where the record shows only that Ferguson did not have counsel; when the record shows that the defendant agreed to proceed without counsel, a court can place the burden of establishing that a waiver was not knowingly and voluntarily made on the defendant. Lucero, 2005 UT 79, ¶25.

In this case where the judgment showed that Ferguson was not represented, the trial court had before it "some evidence" demonstrating that his right to counsel was violated. Pursuant to case law from this Court and the United States Supreme Court, the trial court correctly concluded that it could not presume waiver of counsel, and the state's

failure to establish waiver of counsel required that the enhancement be stricken.

B. *Heaton* and *Faretta* Apply to Collateral Attacks

The state also argues, without any support, that case law governing waiver of counsel in criminal cases applies only on direct review and not in the post-conviction context. State's reply brief at 33. This Court should reject that claim because it is not supported by case law, fails to take into account the "special status" of Gideon claims, fails to ensure that the right to counsel is carefully protected, fails to suggest what analysis, if any should be employed in collateral proceedings where the defendant's right to counsel was violated in the trial court, and fails to acknowledge case law employing exacting standards for determining waiver on collateral review.

Although the state claims that a defendant who is denied his right to counsel and subsequently fails to appeal is precluded from arguing that he did not make a constitutionally adequate waiver of counsel as required by State v. Heaton, 958 P.2d 911 (Utah 1998) and Faretta v. California, 402 U.S. 806 (1975) (state's reply brief at 33), the state fails to back this claim with any case law suggesting that *a right to counsel claim* cannot be raised in post-conviction review. See generally Utah R. App. P. 24(a) (outlining requirements for adequate briefing); State v. Lee, 2006 UT 5, ¶22, ___P.3d___ (further citation omitted) ("to be adequate, briefs must provide 'meaningful legal analysis'"). Instead, the state relies solely on Parke v. Raley, 506 U.S. 20 (1992), a United States Supreme Court case that deals with the application of Boykin v. Alabama, 395 U.S. 238 (1969) in a habeas proceeding. While the state is correct that the Court concluded that Boykin's presumption of invalidity does not apply in the habeas context,

Parke does not support the state's claim that the analysis for waiver of counsel claims outlined in Heaton, Faretta, and other cases does not apply on collateral review. See Parke, 506 U.S. at 29.

United States Supreme Court case law, including Parke, has made it clear that right to counsel claims are "subject to collateral attack in federal habeas court." Id. at 29 (citing *inter alia* Johnson v. Zerbst, 304 U.S. 458 (1938)). The Court has also made it clear that deprivation of counsel claims have a "special status" and are given greater protection than Boykin claims. Custis v. United States, 511 U.S. 485, 493-97 (1994). The Court in Custis distinguished Boykin claims from right to counsel claims, emphasizing that habeas review of right to counsel claims has a "historical basis in our jurisprudence" that "treat[s] the right to have counsel appointed as unique, perhaps because of our oftstated view that 'the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.'" Custis, 511 U.S. at 494 (further citation omitted). The Custis Court declined "to extend the right to attack collaterally prior convictions used for sentence enhancement beyond the right to have appointed counsel established in Gideon" by distinguishing the role of Boykin in a plea hearing from the special role the right to counsel plays in a criminal proceeding. Id. at 496. Custis, which the state fails to acknowledge in making its argument that waiver of counsel cases do not apply in habeas, establishes that Boykin claims such as the claim in Parke do not enjoy the same protection as Gideon claims and also acknowledges that deprivation of counsel claims can be reviewed collaterally. Id.; see also Lackawanna, 532 U.S. at 403 (when a defendant claims that his right to counsel was violated in a prior

proceeding, an exception exists to general rule that defendant cannot attack a "conclusively valid" prior conviction).

Additional case law demonstrates that cases analyzing the requirements for a constitutionally valid waiver apply with equal force in the habeas context as they do on direct review. Such application is critical to ensure that the right to counsel is observed and concomitantly, to ensure the fairness of the trial court proceedings. See Custis, 511 U.S. at 494. For example, Carnley was a habeas case where the United States Supreme Court considered whether the defendant had knowingly and voluntarily waived counsel and refused to employ presumptions in favor of waiver, pointing out that "to cast such a burden on the accused is wholly at war with the standard of proof of waiver of the right to counsel which we have laid down in Johnson v. Zerbst, [ ] ." Carnley, 369 U.S. at 514 (citing Johnson, 304 U.S. at 464-65). The high Court approached the waiver of counsel issue in a manner similar to this Court's approach in Heaton, placing the responsibility on the trial court to clearly establish that the defendant knowingly and willingly proceeded without counsel and indicating that the preferred method would be for such a determination "to appear upon the record." Id. at 515 (further citation omitted). The Court stated in Carnley:

> It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'
>
> 'The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused - - whose life and liberty is at stake - - is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is na intelligent and competent waiver by an accused. While an accused may waive the

> right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear on the record.

Id. at 514 (quoting Johnson, 304 U.S. at 464-65).

Without distinguishing between cases on direct review and those on collateral view, the Court in Faretta also emphasized that a constitutionally adequate waiver requires that a defendant "competently and intelligently [] choose self-representation" and that to make such a choice, the defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with his eyes open.'" Faretta, 422 U.S. at 835 (quoting Adams v. United States ex rel, McCann, 317 US 269, 279 (1942)). In fact, Adams, the case relied on by the Faretta court for this proposition, was a habeas case. See id.

Heaton itself indicates that there is no distinction between the analysis applied for deprivation of counsel challenges raised on direct appeal and those raised in a habeas proceeding. See Heaton, 958 P.2d at 917-19. In outlining the requirements for establishing waiver, this Court relied on habeas cases as well as direct review cases. Id. Quoting Johnson, a habeas case, this Court emphasized a trial court's "weighty responsibility" in ensuring that any waiver of counsel is made intelligently and competently. Id. at 917 (citing Johnson, 304 U.S. at 465). Additionally, still relying on Johnson, this Court recognized that in light of the "heavy burden placed on the trial court to protect this right, there is a presumption against waiver, and doubts concerning waiver must be resolved in the defendant's favor." Heaton, 958 P.2d at 917.

In concluding that "the court must advise the defendant of the dangers and disadvantages of self-representation 'so that the record will establish that "he knows what he is doing and his choice is made with eyes open,"'" Heaton cited Faretta and Adams, the underlying habeas case which gave rise to this language, as well as the habeas case of Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948). Id. at 918. Moreover, this Court quoted the habeas case of Von Moltke for the proposition that "'[a] judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from penetrating and comprehensive examination of all the circumstances.'" Heaton, 958 P.2d at 918 (quoting Von Moltke, 332 U.S. at 724). This Court's reliance on both habeas and direct review cases in reaching its decision in Heaton further demonstrates that the state's claim that the Heaton analysis does not apply in collateral proceedings is without merit. See also Von Moltke, 332 U.S. at 724 (recognizing that a constitutionally adequate waiver of counsel requires more than "the asking of several standard questions followed by the signing of a standard waiver of counsel"); Lucero v. Kennard, 2004 UT App 94, ¶¶22-30, 89 P.3d 175 (Jackson, J., dissenting) (applying Heaton and other waiver cases in post-conviction context).

Aside from the inadequacy of the state's briefing on this point, the state's claim that Heaton and related cases do not apply in a habeas proceeding should be rejected because it is contrary to case law and would undermine the important role of the right to counsel in criminal cases.

C. The State's Failure to Sustain Its Burden of Establishing Waiver Precludes Further Attempts by the State to Reinstate the Dismissed Enhancement on Remand

As a final matter, the state asks that this Court give it a second chance to sustain its burden should this Court agree with the trial court that it was required to establish that Ferguson waived counsel. State's reply brief at 34-36. According to the state, since this is an interlocutory appeal, when this case is remanded it can again try to sustain its burden of showing that Ferguson waived counsel in the prior proceeding. State's reply brief at 34-36

The obvious problem with the state's argument is that the trial court dismissed the enhancement; in the event this Court affirms the trial court, there is no enhancement in place and nothing for the state to attempt to establish. The state has had the opportunity to present the evidence to the trial court and to appeal the trial court ruling while Ferguson has been incarcerated pretrial in the Salt Lake County Jail. The state had the resources to obtain a transcript and its failure to do so in an effort to sustain its burden so as to elevate this case to a felony should preclude a further opportunity to do so.

As the state concedes, either party could have introduced a transcript, but the state was the moving party that was trying to add an element that would turn this crime into a felony; by not making that effort in order to sustain its burden of proof, the state has given up its ability to prosecute this charge as an enhanced felony. The state's failure to obtain a transcript under these circumstances precludes a determination that Ferguson waived counsel and "[a]t most, suggests apprehension on [the state's part] as to what a transcript of the plea proceeding may disclose." State's reply brief at 36.

As a threshold matter, the state has failed to include any authority supporting its request that it be given another "bite of the apple" when this case returns to the trial court. Because the state provides no support for its claim that even though the enhancement has been dismissed, it can try again when the case is remanded, this Court should refuse to review the claim. See Utah R. App. P. 24(a); Lee, 2006 UT 5, ¶22 (requiring adequate briefing in order to review an issue).

Moreover, fairness, due process, and the orderly administration of justice demand that the state not be given "a second bite of the apple." State v. Aspen, 412 N.W. 2d 881, 884 (S.D. 1987). Ferguson has not yet gone to trial and has been in the Salt Lake County Jail for thirty four months as of the date on which this reply brief is filed.[3] If the state is given the opportunity to further litigate this issue in the trial court, additional delay will occur in that court and, in all likelihood, the state might again request interlocutory review if it is unsuccessful. Indeed, the state's reply brief suggests that if it has the opportunity to revisit this issue, legal arguments regarding what constitutes a constitutionally adequate waiver will be raised. See state's reply brief at 33-34. Since the state had the opportunity and responsibility to establish a waiver of counsel, the state should not be afforded a second opportunity to "ameliorat[e] its weak and deficient

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[3] The state appealed the trial court's order and is also the petitioner on certiorari review. This case has been on interlocutory review for more than two years as of the date of this brief; the Court of Appeals granted the state's petition for interlocutory review on January 30, 2004 (R. 323) and the trial court stayed proceedings on February 2, 2004. R. 325. If the state thought it could sustain its burden by providing a transcript of the prior proceeding, it should have done so rather than requiring Ferguson to sit in the county jail for this extended period of time while it pursued an appeal and certiorari review. The state's request that it should be given a second chance to sustain its burden should be denied under these circumstances.

original evidentiary proof . . . ." Aspen, 412 N.W. 2d at 884. Subjecting Ferguson to repeated hearings as the state attempts to assemble its case "is costly to the defendant and state and time consuming of judicial resources." Id. at 884, n.5. In addition, it encourages poor preparation by the state and fails to hold the state to its "responsibility to assemble its proof, in good, effective professionalism, and proceed thereupon." Id. n.5.

Although Aspen was decided on double jeopardy grounds in a case where the enhancement was presented for sentencing purposes, the rationale applies with equal or greater force in this context where Ferguson has not yet gone to trial. See State v. Rogers, 2005 UT App 379, ¶28, 122 P.3d 661 (due process requires "that an unprepared prosecutor should not be free to proceed against a defendant multiple times until her preparation finally reaches the minimal level required for bindover"); State v. Brickey, 714 P.2d 644 (Utah 1986) (fundamental fairness precludes prosecution from refiling dismissed charges unless new evidence or other good cause exists). Allowing the state repeated opportunities to sustain its burden of proof interferes with the orderly administration of justice, encourages lack of preparation on the part of prosecutors and subjects defendants to much lengthier pretrial delay. Accordingly, Ferguson requests that the state not be given a "second bite of the apple" should this Court uphold the trial court's ruling.

CONCLUSION

Appellee/Respondent/Cross-Petitioner Michael Ferguson, by and through counsel, respectfully requests that this Court affirm the decision of the trial court and court of appeals that a misdemeanor conviction with a suspended sentence obtained in violation of

the right to counsel cannot be used to enhance a subsequent charge to a felony. Respondent/Cross-Petitioner Ferguson also requests that this Court reverse the court of appeals' decision that he had the burden of proving that he did not waive counsel, and uphold the trial court's dismissal of the enhancement.

SUBMITTED this 3rd day of February, 2006.

Joan C. Watt

JOAN C. WATT
DEBRA M. NELSON
VERNICE TREASE
Attorneys for Respondent/Cross-Petitioner

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be hand-delivered the original and nine copies of the foregoing to the Utah Supreme Court, 450 South State, 5th Floor, P.O. Box 140230, salt lake City, Utah 84114-0230, and four copies to Fred Voros, Assistant Attorney General, Heber Wells Building, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 24th days of February, 2006.

Joan C Watt
JOAN C. WATT

DELIVERED this ___ day of February, 2006.

ADDENDUM A

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- MICHAEL VON FERGUSON, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER Case No. 031902097 Judge ROBIN W. REESE

The Defendant's Motion to Quash the Bindover having come before this Court for hearing in the above entitled matter on October 24th, 2003, and November 3rd, 2003, in which Defendant was represented by counsel, Vernice Trease, and the State was represented by counsel, B. Kent Morgan and Alicia H. Cook, the Court having fully considered the written memoranda and oral arguments of counsel, this Court now enters its FINDINGS OF FACT and CONCLUSIONS OF LAW and ORDER.

FINDINGS OF FACT

1. On March 18th, 2003, the defendant pled guilty to violating a protective order, a class A misdemeanor, before Judge Medley in District Court case number 031901111, and was sentenced to 365 days in jail. The defendant was not

represented by counsel when he entered his plea. The jail sentence was suspended in its entirety and the defendant was placed on probation.

2. On March 26th, 2003, the State filed an information alleging that the defendant had committed Attempted Homicide, Violation of a Protective Order, Burglary, and Theft of a Firearm. The protective order violation was enhanced to a third degree felony based on the defendant's prior conviction in case number 031901111.

3. A preliminary hearing was held on August 26th, 2003, before Judge Iwasaki. The State presented evidence that the defendant, while carrying a loaded rifle, had climbed onto the roof of a building neighboring the victim's workplace. The State also offered a certified copy of the prior conviction to support the enhanced protective order violation. Defense counsel objected to the use of the prior conviction, and argued that an uncounseled plea could not be used to enhance a subsequent offense. The Court overruled the objection and at the conclusion of the hearing found sufficient probable cause to bind over the Attempted Homicide and Protective Order Violation charges.

4. On October 16th, 2003, counsel for the defense filed a Motion to Quash the Bindover. The defense argued that the defendant's prior uncounseled misdemeanor conviction could not be used to enhance the subsequent offense, and urged the Court to strike the enhancement. The defense also argued that the evidence presented at the preliminary hearing failed to establish that the defendant had actually violated the protective order.

5. This Court heard oral arguments on October 24th, 2003. At the conclusion of the arguments, the Court requested that counsel brief the application of Alabama v. Shelton to the instant case, and scheduled further arguments for November 3rd, 2003.

6. During the November 3rd hearing, counsel for the State argued that Shelton prohibits the imposition of a suspended jail sentence given to a misdemeanor defendant who did not have counsel, but does not invalidate the underlying conviction for purposes of enhancing future crimes. Counsel for the defendant argued that, whenever a suspended jail sentence is given to a misdemeanor defendant, Shelton does not permit the use of that conviction for enhancement.

CONCLUSIONS OF LAW

1. The defense's motion to quash the bindover for insufficient evidence is denied. The State met its burden at the preliminary hearing of showing probable cause regarding the Violation of a Protective Order charge. The defendant's efforts to commit homicide against the victim also constitute a violation of the protective order, which prohibits the defendant from committing or attempting to commit acts of violence against the victim.

2. The defense's motion to quash the bindover of count II as a third degree felony is granted. The Court agrees with the defense that under Alabama v.Shelton, a defendant facing a misdemeanor charge is entitled to counsel when a jail sentence is rendered, regardless of whether the sentence is suspended or actually imposed. Defendant Ferguson did not have counsel at the time he entered his guilty plea

and received a suspended sentence, therefore the prior conviction cannot be used to enhance count II unless the State presents evidence that the defendant knowingly and voluntarily waived his right to counsel. The Court disagrees with the State's argument that Shelton only invalidates the jail sentence given pursuant to an uncounselled misdemeanor conviction, and does not impact the conviction itself.

ORDER

IT IS HEREBY ORDERED that the enhancement to count II is stricken, and count II stands as a class A misdemeanor.

DATED this 21 day of January, 2004.

BY THE COURT:

Judge ROBIN W. REESE

Approved as to form:

Vernice Trease

ADDENDUM B

2005 UT 79

IN THE SUPREME COURT OF THE STATE OF UTAH

----ooOoo----

Benjamin Frank Lucero,
Petitioner,

No. 20040339

v.

Sheriff Aaron Kennard,
Chief Paul Cunningham,
Salt Lake County Jail,
Murray City Justice Court,
Respondents.

F I L E D

November 15, 2005

Third District, Salt Lake
The Honorable Glenn Iwasaki
No. 020907208

Attorneys: Joan C. Watt, Heather Brereton, Salt Lake City, for petitioner
Scott Daniels, Salt Lake City, for Murray City Justice Court
Karl L. Hendrickson, Deputy Dist. Att'y, Salt Lake City, for Sheriff Aaron Kennard, Chief Paul Cunningham, and the Salt Lake County Jail

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On Certiorari to the Utah Court of Appeals

DURRANT, Justice:

INTRODUCTION

¶1 In this case, we are asked to consider whether the Post-Conviction Remedies Act ("PCRA") allows collateral attacks on a justice court conviction when the defendant has failed to seek a trial de novo. The court of appeals concluded that the failure to seek a trial de novo bars a justice court defendant from obtaining post-conviction relief. We granted certiorari to review the court of appeals' opinion. We now affirm.

BACKGROUND

¶2 Petitioner Benjamin Frank Lucero was charged in the Murray City Municipal Justice Court with driving under the influence of alcohol, Utah Code Ann. § 41-6-44 (Supp. 2004), and improper usage of lanes, id. § 41-6-61 (1998). Although the pre-trial conference was continued twice so that Lucero could retain private counsel, Lucero ultimately represented himself throughout the proceedings at the justice court. At the justice court hearing, Lucero pleaded guilty to driving under the influence, and the court dismissed the charge of improper lane usage. The justice court subsequently fined Lucero $1,850 and sentenced him to 180 days in jail and eighteen months' probation. After sentencing, the court found Lucero to be impecunious.[1]

¶3 Lucero subsequently filed a "Petition for Post-Conviction Relief or, in the alternative, a Motion to Correct Illegally Imposed Sentence" in both the Murray Justice Court and the Third District Court.[2] In his petition, Lucero argued that his sentence was imposed in violation of his Sixth Amendment right to counsel. The district court, acting in an appellate capacity, held a hearing to address Lucero's claims and, after considering proffered testimony from the justice court judge, affidavits from the justice court clerks, and testimony from Lucero, concluded that no Sixth Amendment violation had occurred. Accordingly, the district court dismissed Lucero's petition. Lucero filed a timely appeal with the court of appeals to review the district court's order.

¶4 In reviewing the district court's decision, the court of appeals did not examine whether Lucero had effectively waived his right to counsel at the justice court proceeding, but instead affirmed the district court on the ground that Lucero was ineligible for post-conviction relief because he failed to seek a trial de novo in the district court before seeking post-

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[1] Although the docket is sparse, it appears that this finding was made when determining whether Lucero was capable of paying for an outpatient treatment program or the installation of an interlock ignition.

[2] The justice court, in its docket, lists four different filing dates for petitions for post-conviction relief. The first petition for post-conviction relief was filed with the Murray Justice Court on July 3, 2002, within thirty days of the date the justice court judgment was rendered. The record does not indicate that a petition was filed with the Third District Court until nearly a month later, on August 1, 2002.

conviction relief. Lucero v. Kennard, 2004 UT App 94, ¶ 13, 89 P.3d 175. The court of appeals reasoned that any violation of Lucero's constitutional right to counsel could have been remedied by a trial de novo and, by failing to pursue that remedy, Lucero was both procedurally barred from receiving post-conviction relief and ineligible for the "unusual circumstances" exception to the procedural bar rules. Id. ¶ 12. We have jurisdiction pursuant to Utah Code section 78-2-2(3)(a) (2002).

STANDARD OF REVIEW

¶5 On certiorari, we review the court of appeals' decision for correctness, giving its conclusions of law no deference. State v. Geukgeuzian, 2004 UT 16, ¶ 7, 86 P.3d 742.

ANALYSIS

¶6 The issue in this case is whether Lucero is eligible for post-conviction relief. To address this issue we must determine (1) whether the PCRA applies to justice court defendants and, if so, (2) whether Lucero is entitled to post-conviction relief despite his failure to seek a trial de novo to appeal his justice court sentence. We conclude that the PCRA applies to justice court defendants, but that Lucero is not entitled to post-conviction relief because he failed to seek a trial de novo.

¶7 By filing a post-conviction petition, a defendant seeks to collaterally attack a conviction or sentence. Rudolph v. Galetka, 2002 UT 7, ¶ 5, 43 P.3d 467. In 1996, the legislature enacted the PCRA to "establish[] a substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense,"[3] Utah Code Ann. § 78-35a-102 (1) (2002), has a valid

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[3] The PCRA does not apply to

> (a) habeas corpus petitions that do not challenge a conviction or sentence for a criminal offense;
> (b) motions to correct a sentence pursuant to Rule 22(e), Utah Rules of Criminal Procedure; or
> (c) actions taken by the Board of Pardons and Parole.

Utah Code Ann. § 78-35a-102(2) (2002).

ground for relief,[4] id. § 78-35a-104, and is not procedurally barred from bringing a claim for relief, id. § 78-35a-106.

¶8 Respondent, Murray City Justice Court (the "Justice Court") argues that Lucero is precluded from receiving post-conviction relief for two reasons: (1) the PCRA does not apply to justice court defendants and, even if it does, (2) Lucero is procedurally barred from receiving post-conviction relief due to his failure to seek de novo review in the district court. Lucero responds that the PCRA does not limit post-conviction relief to

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[4] The PCRA establishes five grounds for post-conviction relief:

> (a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;
> (b) the conviction was obtained under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;
> (c) the sentence was imposed in an unlawful manner, or probation was revoked in an unlawful manner;
> (d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution; or
> (e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence . . . .

Utah Code Ann. § 78-35a-104(1).

Lucero attacks his sentence under section 78-35a-104(1)(a), arguing that his sentence was imposed in violation of his Sixth Amendment right to counsel. The court of appeals did not assess whether the trial court correctly found that Lucero had effectively waived his right to counsel and was therefore not entitled to post-conviction relief. The court of appeals instead held that Lucero was procedurally barred from receiving post-conviction relief because he had failed to file for a trial de novo in the district court. Lucero v. Kennard, 2004 UT App 94, ¶ 13, 89 P.3d 175. Thus, for the purposes of this proceeding, we will assume that if the deprivation of counsel claim contained in Lucero's petition is true, he would have grounds for post-conviction relief. See Webster v. Jones, 587 P.2d 528, 530 (Utah 1978) (proceeding "upon the assumption that if [the defendant's] claims as to the violation of his basic constitutional rights were true they might bring him within purview of habeas corpus").

district court defendants and, because he could not argue at a trial de novo that the justice court had violated his right to counsel, his failure to pursue a trial de novo does not procedurally bar him from seeking post-conviction relief. We will address each of the arguments in the order presented.

I. THE PCRA APPLIES TO JUSTICE COURT DECISIONS

¶9 We first address the Justice Court's contention that justice court defendants are not eligible to receive post-conviction relief under the PCRA. We conclude that the PCRA does not preclude justice court defendants from receiving post-conviction relief.

¶10 Justice courts are distinct from traditional district courts in a number of respects. For example, justice courts are created by municipalities or counties, Utah Code Ann. § 78-5-101.5 (2002); have jurisdiction over only certain small claims cases, class B and C misdemeanors, and other minor offenses, id. § 78-5-104; and do not maintain a record of the proceedings before them, id. § 78-5-101.

¶11 Because justice courts do not maintain a record of their proceedings, "the appeals process from a justice court decision is unique." Bernat v. Allphin, 2005 UT 1, ¶ 8, 106 P.3d 707. To appeal a sentence or conviction, a justice court defendant must undergo a trial de novo in the district court, instead of having an appellate court examine the record of the proceedings below to review the lower courts' decision. See id.; Utah Code Ann. § 78-5-120(1); cf. Dean v. Henriod, 1999 UT App 50, ¶ 9 n.1, 975 P.2d 946 ("In the traditional appeal, a court . . . reviews the trial court's record and either affirms or reverses the judgment entered therein."). This trial de novo to appeal from a justice court decision is similar to other trials de novo in the sense that the defendant has the opportunity to "relitigate the facts as to his guilt or innocence" as if the case had originated there. Bernat, 2005 UT 1, ¶ 31. But such a trial de novo is not a trial de novo "in the strictest sense" because the district court cannot impose a greater sentence than that imposed at the justice court proceeding. Id. ¶ 31 n.12.

¶12 In this case, rather than seek a trial de novo to appeal his justice court sentence, Lucero filed a petition for post-conviction relief. The PCRA entitles "any person who challenges a conviction or sentence for a criminal offense" to post-conviction relief, provided that person meets certain requirements. Utah Code Ann. § 78-35a-102 (emphasis added).

Despite this broad language, which does not appear to limit post-conviction relief to criminal cases filed in district courts, the Justice Court claims that the relief provided by the PCRA does not apply to justice court defendants for two reasons. First, it argues that the language of the PCRA and the procedural provisions governing the act's operation contain requirements that cannot be fulfilled by justice court defendants. Second, the Justice Court argues that, without a record to review, it is so difficult for a district court to determine what occurred at the justice court proceeding below that review of a post-conviction petition in such situations is impracticable. We will analyze each argument in turn.

¶13 Before addressing the Justice Court's arguments, however, it should first be noted that the PCRA cannot limit this court's authority to review justice court defendants' petitions for post-conviction relief. See Gardner v. Galetka, 2004 UT 42, ¶ 17, 94 P.3d 263. Under the Utah Constitution, "the power to review post-conviction petitions 'quintessentially . . . belongs to the judicial branch of government.'" Id. (quoting Hurst v. Cook, 777 P.2d 1029, 1033 (Utah 1989)); see also Utah Const. art. VIII, § 3 ("The Supreme Court shall have original jurisdiction to issue all extraordinary writs . . . ."). Thus, "the legislature may not impose restrictions which limit [post-conviction relief] as a judicial rule of procedure, except as provided in the constitution." Gardner, 2004 UT 42, ¶ 17 (internal quotation omitted). To the extent the PCRA "purports to erect an absolute bar to this court's consideration of . . . post-conviction petitions, it suffers from constitutional infirmities." Id. Accordingly, the enactment of the PCRA did not, and could not, limit this court's right to grant post-conviction relief to justice court defendants. Having clarified this point, we now turn to the Justice Court's arguments concerning the PCRA's applicability to justice court proceedings.

A. The Requirements of the PCRA May Be Fulfilled by Justice Court Defendants.

¶14 The Justice Court claims that justice court defendants cannot fulfill the requirements contained within the PCRA and its procedural provision, Utah Rule of Civil Procedure 65C,[5] and that the defendants are therefore ineligible for post-conviction relief. Specifically, the Justice Court argues that a justice court defendant cannot fulfill the PCRA's requirements that (1) a

[5] Utah Rule of Civil Procedure 65C "govern[s] proceedings in all petitions for post-conviction relief filed under [the PCRA]." Utah R. Civ. P. 65C(a).

petition for post-conviction relief be filed "in the district court of original jurisdiction," Utah Code Ann. § 78-35a-104(1); (2) a defendant directly appeal or otherwise have an on-the-record review of their conviction or sentence before seeking post-conviction relief, id. § 78-35a-102; and (3) a clerk assign and deliver a petition for post-conviction relief to the judge who sentenced the petitioner, Utah R. Civ. P. 65C(f). We are not persuaded.

¶15 First, the Justice Court argues that a justice court defendant cannot file a petition in the district court with original jurisdiction because district courts do not have original jurisdiction over justice court cases. This assertion is incorrect because the scope of a district court's original jurisdiction is defined more broadly than the scope of its subject matter jurisdiction. See Utah Code Ann. § 78-3-4(1), (8). Utah Code section 78-3-4, which delineates the scope of a district court's jurisdiction, differentiates between a district court's original and subject matter jurisdiction. Id. The statute states that the district court has original jurisdiction over "all matters civil and criminal," not prohibited by the constitution or law, id. § 78-3-4(1), but notes that, that "[n]otwithstanding," the district court generally does not have subject matter jurisdiction over justice court cases,[6] id. § 78-3-4(8). Therefore, a justice court defendant may file a petition for post-conviction relief in the district court of original jurisdiction by filing it with the district court located in the

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[6] Notwithstanding [the scope of a district court's original jurisdiction], the district court has subject matter jurisdiction in class B misdemeanors, class C misdemeanors, infractions, and violations of ordinances only if:
(a) there is no justice court with territorial jurisdiction;
(b) the matter was properly filed in the circuit court prior to July 1, 1996;
(c) the offense occurred within the boundaries of the municipality in which the district courthouse is located and that municipality has not formed a justice court; or
(d) they are included in an indictment or information covering a single criminal episode alleging the commission of a felony or a class A misdemeanor.
Utah Code Ann. § 78-3-4(8)(2002).

same district as the justice court.

¶16 Second, the Justice Court argues that justice court defendants cannot fulfill the PCRA requirements because they cannot directly appeal a conviction or receive an on-the-record review of the proceedings below. The Justice Court cites three instances in which the PCRA and rule 65C require a defendant to directly appeal a conviction or sentence in order to be eligible for post-conviction relief. First, to be entitled to post-conviction relief, the PCRA states that a defendant must have "exhausted all other legal remedies, including a direct appeal." Id. § 78-35a-102. Second, rule 65C requires that the petition for post-conviction relief state "whether the judgment . . . has been reviewed on appeal." Utah R. Civ. P. 65C(C)(4). Third, rule 65C requires that the petition for post-conviction relief include a copy of "any opinion issued by an appellate court regarding the direct appeal of the petitioner's case." Id. 65C(d)(2).

¶17 Nowhere in the PCRA or rule 65C, however, are on-the-record reviews and direct appeals mandated. Instead, the provisions cited by the Justice Court merely require that defendants pursue a direct appeal if that remedy is available and that the petition for post-conviction relief include a statement about whether an appeal has occurred and, if it has, a copy of that appeal. Thus, justice court defendants can meet the PCRA requirements by exhausting the available legal remedies and including in their petitions for post-conviction relief a statement that the justice court judgment has not been reviewed on appeal.

¶18 Third, the Justice Court argues that a clerk cannot assign a petition for post-conviction relief to the judge who sentenced the petitioner because justice court judges do not have jurisdiction over petitions for post-conviction relief. This argument fails because rule 65C allows a clerk to assign the petition "in the normal course" if the judge who sentenced the defendant is unavailable. Id. 65C(f).

¶19 In short, justice court defendants can fulfill all of the requirements that the PCRA and rule 65C place on defendants seeking post-conviction relief.

B. A Court May Review Petitions for Post-Conviction Relief Without a Record.

¶20 We next address the Justice Court's argument that a district court cannot determine whether to grant post-conviction

relief to justice court defendants because the absence of a record of the proceedings below renders a review of the petition impracticable. Although a review without the aid of a record may be more difficult than a review in which a record is available, we conclude that a court is capable of determining whether a justice court defendant is entitled to post-conviction relief even without a record of the proceedings below.

¶21 The Justice Court supports its argument that a record is essential for an appellate court to conduct a meaningful review of the justice court's proceedings by citing to Jones v. State, 789 N.E.2d 478 (Ind. 2003). In Jones, the Indiana Supreme Court noted that Indiana's post-conviction relief statute seemed generally applicable, but held that it was written with courts of record in mind because a transcript of the trial was necessary to assess the types of claims asserted in post-conviction proceedings. Id. at 480. The court reasoned that the claims generally raised in petitions for post-conviction relief are dependent on what happened in the proceedings below. Id. As an example, the court noted that for an ineffective assistance of counsel claim, a review of the record was necessary to examine the adequacy of counsel's performance. Id. at 481. Without a transcript, the court would be forced to rely on "the memories of the participants in a misdemeanor trial that occurred years in the past." Id.

¶22 Jones, however, is inharmonious with our case law. While we have previously recognized the difficulty that an appellate court may have in deciding whether to grant post-conviction relief without a record of the proceedings below, we have also reviewed petitions for post-conviction relief without the aid of a record. See Webster v. Jones, 587 P.2d 528, 529 (Utah 1978). In Webster, this court reviewed a city court defendant's petition for post-conviction relief based on a denial of the defendant's right to counsel. Id. Although there was no record and the court acknowledged that the plaintiff's testimony was "self-serving," the court was able to adequately discern what happened at the proceedings below by looking at the court docket and considering the plaintiff's own testimony. Id.

¶23 Furthermore, in instances where there is even less evidence of what occurred at the proceeding below than that presented in Webster, a court may determine whether a party is entitled to post-conviction relief by deciding who has the burden of proof and whether that burden has been met. The absence of a record does not foreclose post-conviction challenges, but merely makes it more difficult for a party to meet the applicable burden.

¶24 In a proceeding where a defendant seeks to collaterally attack a court's judgment, we presume the regularity of the proceedings below. Price v. Turner, 502 P.2d 121, 122 (Utah 1972) ("After one has been convicted of crime [sic] the presumption of innocence and other protections afforded an accused no longer obtain. The presumptions then are in favor of the propriety of the proceedings . . . ."); see also Johnson v. Zerbst, 304 U.S. 458, 468 (1938) ("When collaterally attacked, the judgment of a court carries with it a presumption of regularity."), overruled on other grounds by Edwards v. Arizona, 451 U.S. 477 (1981). The petitioner bears the burden of overcoming this presumption by a preponderance of the evidence. See Moore v. Michigan, 355 U.S. 155, 161 (1957); Johnson, 304 U.S. at 469; see also Price, 502 P.2d at 122 (placing burden of rebutting presumption of regularity upon the petitioner).

¶25 That presumption notwithstanding, the analysis of whether a defendant is entitled to post-conviction relief is more complicated in cases where a defendant raises a deprivation of counsel claim because of the "special status" conferred upon the constitutional right to counsel. Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 404 (2001) (concluding that failure to appoint counsel claim "warrants special treatment among alleged constitutional violations"); see Custis v. United States, 511 U.S. 485, 494-96 (1994) (discussing the "historical basis" for treating collateral attacks based on a denial of the right to counsel differently than other constitutional rights). A court may not presume waiver of the right to counsel unless there is some evidence that the defendant affirmatively acquiesced to the waiver of counsel. See Carnley v. Cochran, 369 U.S. 506, 516-17 (1962) ("[N]o . . . burden [to overcome a presumption of regularity] can be imposed upon an accused unless the record--or a hearing, where required--reveals his affirmative acquiescence."); State v. Hamilton, 1987 Utah LEXIS 638 at *5 ("Waiver [of the right to counsel] may not be presumed by a silent record."); see also Arbuckle v. Turner, 440 F.2d 586, 589 (10th Cir. 1971) (holding that waiver of the right to counsel cannot be presumed); Clark v. Turner, 283 F. Supp. 909, 913 (D. Utah 1968) (same). If such evidence is presented, the defendant has the burden of proving that the right to counsel was not knowingly, intelligently, and voluntarily waived. See Iowa v. Tovar, 541 U.S. 77, 92 (2004) ("[I]n a collateral attack on an uncounseled conviction, it is the defendant's burden to prove that he did not competently and intelligently waive his right to the assistance of counsel."); Carnley, 369 U.S. at 515 ("Presuming waiver [of the right to counsel] from a silent record is impermissible. The record must show, or there must be an

allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer."); see also Dyett v. Turner, 287 F. Supp. 113, 115-16 (D. Utah 1968) (imposing burden on defendant to show invalidity of waiver of counsel when the record did not indicate that the waiver was involuntary); McGhee v. Sigler, 328 F. Supp. 538, 542 (D. Neb. 1971) ("[I]f there was acquiescence by the defendant in the trial court's not appointing counsel, the burden then becomes the defendant's . . . .").

¶26 In this case Lucero seeks post-conviction relief based on an alleged violation of his right to counsel. Like the court in Webster, the district court attempted to discern what occurred in the proceedings below by looking at the court docket and accepting testimony and other evidence. After considering the evidence, the district court determined that Lucero effectively waived his right to counsel and that he was not entitled to post-conviction relief.

¶27 As demonstrated by the proceedings in Webster and in the district court below, the task of determining whether to grant post-conviction relief without a record, although difficult, is not impossible. Even though the task of discerning what occurred at the proceedings below is sometimes onerous, it is still a judicial duty, and difficulty is not an argument for shirking that duty.

II. LUCERO IS NOT ELIGIBLE FOR POST-CONVICTION RELIEF

¶28 Having determined that the PCRA applies to justice court defendants, we now turn to the central issue in this case: whether Lucero is eligible for post-conviction relief even though he failed to seek a trial de novo to appeal from the justice court decision. Because Lucero did not exhaust his legal remedies when he failed to seek a trial de novo and does not qualify for the unusual circumstances exception to the procedural bar rules, we conclude that he is not eligible for such relief.

¶29 Our common law post-conviction jurisprudence is markedly different than the PCRA. Most notably, under our common law jurisprudence, a defendant is procedurally barred from receiving post-conviction relief in instances where "a contention of error [was] known or should have been known to the petitioner at the time of judgment," and the defendant failed to raise the error and appeal it "through the regular and prescribed procedure." Carter v. Galetka, 2001 UT 96, ¶ 14, 44 P.3d 626. In contrast, the PCRA contains two provisions that significantly limit a defendant's right to seek post-conviction relief. First,

section 78-35a-106 precludes a petitioner from receiving post-conviction relief if the ground for relief

> (a) may still be raised on direct appeal or by a post-trial motion;
> (b) was raised or addressed at trial or on appeal;
> (c) could have been but was not raised at trial or on appeal [unless due to ineffective assistance of counsel];
> (d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or
> (e) is barred by the [one-year] limitation period established in Section 78-35a-107.

Utah Code Ann. § 78-35a-106 (2002). Second, to be eligible for post-conviction relief, the defendant must have "exhausted all other legal remedies, including a direct appeal." Id. § 78-35a-102.

¶30 Also, under our common law post-conviction jurisprudence, in instances where a defendant was procedurally barred from receiving post-conviction relief, a court could nevertheless grant such relief if the court determined that unusual circumstances existed. Carter, 2001 UT 96, ¶ 15; see also Hurst v. Cook, 777 P.2d 1029, 1035-36 (Utah 1989). An equivalent exception is noticeably absent from the PCRA.

¶31 Despite these apparent differences, the PCRA does not place any additional restrictions on this court's ability to review petitions for post-conviction relief, nor does it limit our ability to apply common law exceptions to the procedural bar rules codified therein. See supra ¶ 12; see also Gardner v. Galetka, 2004 UT 42, ¶¶ 9, 17-18, 94 P.3d 263 (holding that our common law post-conviction procedural bar jurisprudence survived the enactment of the PCRA).

¶32 In this case, the Justice Court contends that Lucero is ineligible for post-conviction relief because he failed to pursue a trial de novo. Even though the Justice Court concedes that a claim that a constitutional right has been violated in the proceeding below cannot be raised at the trial de novo, it argues that such a proceeding is an available legal remedy for such claims. In this case, we rely on the PCRA's exhaustion of remedies requirement to determine whether Lucero is eligible for post-conviction relief because that requirement is consistent

with our common law procedural bar jurisprudence, which requires a defendant to raise a known error and appeal it through regular and prescribed procedures. Carter, 2001 UT 96, ¶ 14. Therefore, to determine whether the court of appeals erred in dismissing Lucero's Petition for Post-Conviction Relief, we must first ascertain whether Lucero exhausted his legal remedies. Then, if he did not, we must determine whether unusual circumstances exist that excuse his failure to exhaust his legal remedies.

A. Lucero Failed to Exhaust His Legal Remedies

¶33 To determine whether Lucero was eligible for post-conviction relief, we must first ascertain whether he exhausted his legal remedies. Because Lucero failed to pursue a trial de novo, which would have provided a plain, speedy, and adequate remedy to the violation of his Sixth Amendment right to counsel, we conclude that he did not.

¶34 Lucero argues that he was not required to seek a de novo trial to be eligible for post-conviction relief because his claim that he was deprived of counsel at the justice court proceeding could not be raised in a de novo trial. The Justice Court does not refute this contention, but instead asserts that Lucero is not eligible for post-conviction relief because the deprivation of his right to counsel could have been remedied at such a trial. We agree with the Justice Court.

¶35 Other jurisdictions that have addressed this issue have adopted two different approaches: (1) allowing justice court defendants to elect between filing for a trial de novo, thereby waiving their constitutional claims, or filing for post-conviction relief, see Commonwealth v. Speights, 509 A.2d 1263, 1264 n.2 (Pa. Super. Ct. 1986); and (2) allowing a district court to review constitutional due process claims at the trial de novo, see Hardin v. People, 216 P.2d 429, 430 (Colo. 1950) ("All [complaints, including denial of counsel,] could have been urged on appeal to the county court . . . ."). The Justice Court advocates yet another approach--requiring all justice court defendants to undergo a trial de novo before seeking post-conviction relief.

¶36 We decline to adopt any of these approaches as each is inharmonious with the nature of and policy behind post-conviction relief. To be eligible for post-conviction relief, defendants have consistently been required to appeal errors through regular and prescribed procedures in order to prevent extraordinary relief from being used as a substitute for normal appellate procedures. See Carter, 2001 UT 96, ¶ 14; Codianna v. Morris,

660 P.2d 1101, 1104 (Utah 1983). As an extraordinary remedy, post-conviction relief can only be granted "[w]here no other plain, speedy and adequate remedy is available." Utah R. Civ. P. 65B.

¶37 Therefore, we must reject the election-of-remedy approach because it would establish post-conviction relief as an available substitute to normal appellate procedure in direct contravention of the purpose behind extraordinary relief. Furthermore, such an approach may lead to inconsistent remedies for identical constitutional violations depending upon what remedy the justice court defendant elected. We also reject the approach that allows a district court to examine constitutional due process claims at a trial de novo and the approach that requires a defendant to undergo a trial de novo, because these approaches would either expand the scope of a trial de novo or lead to a waste of judicial resources in situations where a trial de novo could not remedy the alleged constitutional violation.

¶38 Instead, we adopt a more flexible test. As mentioned above, to be entitled to post-conviction relief, a petitioner must pursue any regular and prescribed method for attacking a conviction or sentence that would provide a plain, speedy, and adequate remedy in the ordinary course of law. The regular and prescribed method for appealing a justice court conviction is to seek a trial de novo in the district court. Utah Code Ann. § 78-5-120 (2002). Thus, the critical inquiry to determine whether a justice court defendant must seek a de novo trial in order to meet the exhaustion requirement and be eligible for post-conviction relief is this: could a trial de novo provide the justice court defendant with a plain, speedy, and adequate remedy for the alleged constitutional violation? In other words, where an appropriate remedy for a constitutional violation would be a new trial, a justice court defendant must undergo a trial de novo to meet the exhaustion requirement. To obtain post-conviction relief if a justice court defendant has not sought a trial de novo, the defendant must establish that the constitutional violation was the kind that would demand relief beyond a new trial.[7]

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[7] A trial de novo may not be an adequate remedy for certain constitutional violations such as failure to grant a speedy trial or when exculpatory evidence has been lost or destroyed. Also, a court must dismiss a case with prejudice in instances where prosecutorial misconduct is so severe that lesser sanctions could not result in a fair trial. U.S. v. Lin Lyn Trading, Ltd., 149 F.3d 1112, 1118 (10th Cir. 1998); see New Mexico v. Eder, 704 (continued...)

¶39 In this case, Lucero has alleged that he was deprived of his right to counsel. Both the federal and Utah constitutions guarantee a defendant's right to counsel. U.S. Const. amend. VI; Utah Const. art. I, § 12. "Concomitant with this right is the criminal defendant's guaranteed right to elect to present his own defense." State v. Hassan, 2004 UT 99, ¶ 21, 108 P.3d 695.

¶40 When a defendant elects to proceed pro se, is convicted, and subsequently attacks the conviction or sentence based on a deprivation of the right to counsel, the court must determine whether the defendant exercised the "right to self-representation voluntarily, knowingly, and intelligently." Id. If the court concludes that the waiver was ineffective, the court may remedy the violation of that right in a number of ways. See generally Karen L. Ellmore, Annotation, Relief Available for Violation of Right to Counsel at Sentencing in State Criminal Trial, 65 A.L.R. 4th 183 (2004) (listing forms of relief available when counsel is absent from a sentencing hearing). For example, a court may vacate the sentence and order a new trial, Billings v. Smith, 932 P.2d 1058, 1063 (Mont. 1997) (vacating sentence and granting new trial to remedy denial of effective assistance of counsel); modify the defendant's sentence with or without a new penalty hearing, see Gardner v. Holden, 888 P.2d

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[7] (...continued)
P.2d 465, 467-69 (N.M. Ct. App. 1985) (discussing cases where dismissal with prejudice is required to remedy prosecutorial misconduct). For example, prosecutorial misconduct that is severe enough to prevent a trial de novo from providing an adequate remedy for an alleged constitutional violation includes the following: when the prosecutor has prevented a defendant from collecting evanescent, exculpatory evidence, McNutt v. Arizona, 648 P.2d 122, 125 (Ariz. 1982) ("Dismissal of the case with prejudice is the appropriate remedy because the State's action foreclosed a fair trial by preventing petitioner from collecting exculpatory evidence no longer available."); when there is a failure to prosecute, Utah Rules of Crim. P. 25(b)(1); when the state refuses to identify an informant, Harris v. Superior Court, 35 Cal. App. 3d 24, 26-27 (Cal. Ct. App. 1973) ("If the original trial without [the identity of a material witness] was unfair, a retrial sans same would be nothing but a replay of a constitutionally defective record."); when an informant or other inappropriate party was present during privileged conversations, U.S. v. Levy, 577 F.2d 200, 210 (3d Cir. 1978); or when the prosecutor has breached a bargain not to prosecute, see U.S. v. Pascal, 496 F. Supp 313, 319 (N.D. Ill 1979).

608, 611 (Utah 1994) (discussing correctness of trial court's decision to grant defendant a new penalty hearing and appeal to remedy the alleged denial of effective assistance of counsel); Kuehnert v. Turner, 499 P.2d 839, 840-41 (Utah 1972) (remanding for resentencing hearing to remedy absence of counsel at sentencing); preserve the original sentence if the court finds that the defendant was not prejudiced by the absence of counsel, see State v. Neal, 262 P.2d 756, 758-59 (Utah 1953) (preserving original sentence because sentencing was merely a ministerial act and counsel could not have assisted defendant at sentencing); or, in "comparatively few" cases, set aside the sentence and release the defendant from confinement, Ellmore, supra ¶ 39, at 192; Shayesteh v. S. Salt Lake, 217 F.3d 1281, 1284 (10th Cir. 2000) ("By denying the defendant counsel, the court effectively waives its right to sentence him to prison." (internal quotation omitted)).

¶41 Although a trial de novo may not be the justice court defendant's preferred alternative, it provides an adequate remedy for a deprivation of counsel claim because the district court can appoint counsel at the "critical guilt adjudication stage." See Alabama v. Shelton, 535 U.S. 654, 668 n.5 (2002). In fact, the de novo trial is a more favorable form of appeal than that offered to redress constitutional violations committed at the district court level. Bernat v. Allphin, 2005 UT 1, ¶ 41, 106 P.3d 707 ("[A] justice court defendant is . . . treated more favorably than a similarly situated district court defendant."); see also Jones v. State, 789 N.E.2d 478, 480 (Ind. 2003) (noting that a trial de novo is "the most congenial form of appeal"). Before an appellate court may order a new trial in an appeal from a district court, the court must conduct an evidentiary hearing to determine whether there was prejudicial error in the proceedings below. See Bernat, 2005 UT 1, ¶ 18; Utah v. Arguelles, 921 P.2d 439, 441 (Utah 1996) (requiring defendant to show that counsel's deficient performance prejudiced the defendant); Jones, 789 N.E.2d at 480. In the justice court context, however, a justice court defendant has a "second opportunity to relitigate the facts relating to his or her guilt or innocence" as a matter of right. Bernat, 2005 UT 1, ¶ 41. Accordingly, we conclude that Lucero did not exhaust his legal remedies because any violation of Lucero's right to counsel could have been adequately remedied by a trial de novo.

B. Unusual Circumstances Exception

¶42 Having determined that Lucero failed to exhaust his legal remedies, we now turn to the issue of whether unusual circumstances exist that excuse this omission. We conclude that

Lucero is not eligible for post-conviction relief under the unusual circumstances exception.

¶43 The unusual circumstances exception provides a defendant who is otherwise ineligible to receive post-conviction relief an opportunity to have a petition for post-conviction relief reviewed. Carter, 2001 UT 96, ¶ 15; Hurst, 777 P.2d at 1035. Therefore, once a court determines that a defendant is procedurally barred from seeking post-conviction relief, the court must then ascertain whether the defendant is nevertheless entitled to have an appellate court review the petition because unusual circumstances exist.

¶44 Lucero argues that the court of appeals misapplied the unusual circumstances exception by improperly combining the exhaustion of remedies and unusual circumstances analyses. Although we recognize that the unusual circumstances exception requires an analysis independent of the exhaustion of remedies analysis, we conclude that the court of appeals properly determined that unusual circumstances do not exist in this case.

¶45 To qualify for the unusual circumstances exception to the procedural bar rules, a petitioner must demonstrate that "an obvious injustice or a substantial and prejudicial denial of a constitutional right" has occurred. Carter, 2001 UT 96, ¶ 15; see also Hurst, 777 P.2d at 1035. "The unusual circumstances test was intended to assure fundamental fairness and to require reexamination of a conviction on habeas corpus when the nature of the alleged error was such that it would be unconscionable not to reexamine . . . and thereby to assure that substantial justice was done." Holden, 888 P.2d at 613 (internal quotation omitted).

¶46 In this case, Lucero has not demonstrated that unusual circumstances exist that excuse his failure to seek a trial de novo. He filed his petition for post-conviction relief within thirty days of the date that the justice court entered its sentence. At that time, Lucero was still statutorily eligible to file for a trial de novo. Utah Code Ann. § 78-5-120 (2002). The record indicates that Lucero was represented by counsel at the time he decided to pursue post-conviction relief instead of a trial de novo. Given these facts, the circumstances surrounding this case do not rise to the level of an obvious injustice or a substantial and prejudicial denial of a constitutional right.

CONCLUSION

¶47 We conclude that the PCRA does not limit this court's authority to grant post-conviction relief to justice court

defendants. We further conclude that Lucero failed to exhaust his legal remedies and that he is not otherwise entitled to a review of his petition for post-conviction relief under the unusual circumstances exception. We therefore affirm.

¶48 Chief Justice Durham, Associate Chief Justice Wilkins, Justice Parrish, and Justice Nehring concur in Justice Durrant's opinion.